

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RANDALL D. BRUMBACK**

Claimant

VS.

**CITY OF LEAWOOD**

Respondent

AND

**KANSAS EASTERN REGION TRUST**

Insurance Fund

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Docket No. 265,564

**ORDER**

Respondent and its insurance fund appealed the June 25, 2003 Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on January 6, 2004. Stacy Parkinson of Olathe, Kansas, served as Board Member Pro Tem in place of Board Member Julie A. N. Sample, who recused herself from this claim.

**APPEARANCES**

Michael R. Lawless of Overland Park, Kansas, appeared for claimant. Frederick J. Greenbaum of Kansas City, Kansas, appeared for respondent and its insurance fund.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award.

**ISSUES**

Claimant alleges that he injured his neck, low back, and both upper extremities while working for respondent as a firefighter and emergency medical technician. Claimant alleges that he sustained a series of repetitive traumas through his last day of working for respondent in May 2001 and he also alleges a specific incident on November 4, 2000.

In the June 25, 2003 Award, Judge Foerschler determined claimant failed to prove that his work activities caused claimant's bilateral carpal tunnel syndrome. On the other

hand, the Judge concluded claimant sustained work-related injuries to both his cervical spine and lumbar spine, which resulted in a 5.8 percent wage loss and a 53.84 percent task loss for a 29.82 percent permanent partial general disability.

After reviewing the partes' briefs to this Board and after hearing the parties' oral arguments, the following issues are before the Board on this appeal:

**1. Did claimant prove that his alleged low back injury and his alleged bilateral carpal tunnel syndrome condition were caused by the work that he performed for respondent?**

Claimant contends he injured his low back in either the November 2000 incident when he slipped while descending a ladder or by the repetitive traumas that he sustained throughout his employment with respondent. Claimant also contends his bilateral carpal tunnel syndrome was caused by the repetitive traumas that he sustained during his 17 years as a firefighter and emergency medical technician. Accordingly, claimant argues he has sustained a 27 percent whole body functional impairment for those injuries.

Conversely, respondent and its insurance fund contend claimant only proved that he injured his cervical spine as a result of the November 4, 2000 accident. They deny claimant's work activities caused either the bilateral carpal tunnel syndrome or the low back injury. Therefore, respondent and its insurance fund argue claimant has sustained a mere five percent whole body functional impairment due to the injuries that he sustained while working for respondent.

**2. What wage loss did claimant incur as a result of the injuries he sustained while working for respondent?**

Claimant contends his wage loss should be measured by comparing his pre-injury average weekly wage to the disability benefits that he now receives. Therefore, claimant contends he has sustained a 65.5 percent wage loss.

On the other hand, respondent and its insurance fund contend they offered claimant a job that he unreasonably refused to perform and, therefore, claimant's post-injury wage should be imputed based upon that offer. Accordingly, respondent and its insurance fund request the Board to affirm the Judge's finding of a 5.8 percent wage loss.

**3. What is claimant's permanent partial general disability?**

Claimant contends he has sustained a 65.5 percent wage loss and either a 53.84 percent or 76.92 percent task loss for purposes of the permanent partial general disability

formula. Consequently, claimant requests either a 59.67 percent or 71.21 percent work disability (a permanent partial general disability greater than the functional impairment rating).

But respondent and its insurance fund contend claimant's rejection of respondent's job offer precludes any work disability as the imputed post-injury wage exceeds 90 percent of his pre-injury wage. Hence, they argue claimant's permanent partial general disability is limited to his whole body functional impairment rating, which they contend is five percent.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The June 25, 2003 Award should be modified to increase claimant's permanent partial general disability from 29.82 percent to 65 percent. Moreover, claimant is entitled to receive workers compensation benefits for his bilateral carpal tunnel syndrome.

**1. Did claimant prove that his alleged low back injury and his alleged bilateral carpal tunnel syndrome condition were caused by the work that he performed for respondent?**

Judge Foerschler determined claimant injured both his low back and cervical spine as a direct result of the work that he performed for respondent. The Board agrees with that finding. But the Board also finds it is more probably true than not that claimant's bilateral carpal tunnel syndrome was directly caused or aggravated by the work which he performed for respondent for approximately 17 years as a firefighter and emergency medical technician (EMT).

Respondent and its insurance fund do not contest that claimant's cervical spine or neck injury was caused by a work-related accident. But they do contest claimant's low back injuries and bilateral carpal tunnel condition were caused by his work. The Board acknowledges that neither Dr. Robert R. Brown, who treated claimant from early November through late December 2000, and Dr. Steven L. Hendler, who initially evaluated claimant at the Judge's request, believed claimant's bilateral carpal tunnel syndrome and low back complaints were related to his work as a firefighter and EMT.

The Board in this instance, however, finds Dr. J. Douglas Cusick to be the most persuasive regarding the cause of claimant's bilateral carpal tunnel syndrome. In April 2001, after another doctor had recommended bilateral carpal tunnel release surgeries, respondent and its insurance fund's medical case manager referred claimant to Dr. Cusick for an evaluation. Dr. Cusick, who regularly treats firefighters and police officers for the

Kansas City, Kansas, and Wyandotte County unified government, concluded the repetitive traumas claimant sustained over his years as a firefighter either caused or notably contributed to his bilateral carpal tunnel syndrome. Following the evaluation, Dr. Cusick informed the medical case manager that claimant's carpal tunnel syndrome was related to his work.

The Board is also cognizant of Dr. P. Brent Koprivica's opinion that claimant's years of firefighting activities were medically competent to contribute substantially to claimant's bilateral carpal tunnel syndrome. Moreover, Dr. Koprivica could not identify any separate systemic illness that would have placed claimant at increased risk to develop the syndrome.

Consequently, the Board finds it is more probably true than not that claimant injured his neck, low back and both upper extremities as a result of the work he performed for respondent. Furthermore, the Board concludes claimant sustained a 27 percent whole body functional impairment as a result of those work-related injuries. Accordingly, claimant is entitled to receive medical treatment under the Workers Compensation Act for his bilateral carpal tunnel syndrome.

**2. What wage loss did claimant incur as a result of the injuries that he sustained while working for respondent?**

Claimant contends the Judge erred by imputing a post-injury wage based upon the salary of the communications officer job that respondent offered to claimant. The Board agrees.

Because of claimant's work-related injuries, it was readily apparent to the parties that claimant would not be able to return to his job as a firefighter and EMT. Consequently, by letter dated April 11, 2002, respondent offered claimant a job as a communications officer or police dispatcher. The letter read:

Chief Florance has advised me of the lifting restrictions that, unfortunately, prevent you from performing the duties of Firefighter.

We do not like to lose long-standing employees such as you. The City currently has an open position that fits within your restrictions: Communications Officer in the Police Department. We are offering you the position at an annual rate of \$41,364. The primary responsibilities of the Communications Officer are receiving and dispatching 9-1-1 emergency calls and other calls, communicating pertinent information to officers in the field, and entering and obtaining records and information using a computer terminal.

Please consider and advise me of your decision by Friday, April 19, 2002. Don't hesitate to call me at extension 102 should you have any questions.<sup>1</sup>

Fire Chief Ben Florance presented the April 11, 2002 letter to claimant. But the chief had little, if any, knowledge or information about the job or its requirements. Claimant's testimony is uncontradicted that he then obtained a written copy of the communications officer job description and he also spoke with two police officers who had some knowledge of the job. The job description read, in part:

City of Leawood seeks qualified applicants for Police Communications Officer. Duties incl. receiving and dispatching incoming 9-1-1 emergency & non-emergency calls; retrieving and conveying info to field officers by radio, w/codes, proper procedures and techniques; computer entry in ALERT, NCIC, other law enforcement programs; recording calls, radio, telephone traffic, stolen property and license plates, missing persons, municipal court warrants, other data; equip. maint. and safety. Requirements incl. ability to effectively communicate via radio, telephone and w/others; ability to work under stress, w/ distractions, to exercise discretion & independent judgment in variety of situations; basic education; some experience w/computers, typing 35 w.p.m., and experience with CAD helpful. Preferred: H.S. dipl. or equiv. and exp. w/public safety dispatch. . . . Offer of employment will be conditional upon passing all approp. tests incl. drug screen. . . .<sup>2</sup>

By letter dated April 17, 2002, claimant declined the job offer explaining, among other things, that he could not sit for the required eight- to 12-hour shifts, that he had little knowledge of computers, and that he could not type the required 35 words per minute.

Respondent and its insurance fund now argue claimant should have attempted the communications officer job as the workstations were remodeled and other changes were made so that the job does not require a person to constantly sit. They also contend respondent has a typing program that teaches a person how to type and, besides, accuracy, not speed, is really what is desired as the requirement of typing 35 words per minute has been discarded. They also contend new dispatchers receive 14 weeks of training to learn the job and the law enforcement programs. Yet neither respondent nor its insurance fund ever communicated those facts to claimant despite it being obvious from his April 17, 2002 letter that he was rejecting the job based upon information that respondent and its insurance fund now argue was incorrect.

The Board finds respondent and its insurance fund, after receiving claimant's April 17, 2002 letter, were remiss in failing to promptly communicate with claimant to provide him

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<sup>1</sup> R.H. Trans., Resp. Ex. A.

<sup>2</sup> See R.H. Trans., Cl. Ex. 1.

with accurate information regarding the communications officer position and failing to advise claimant that respondent intended to accommodate his injuries. Furthermore, the record does not disclose if claimant was ever advised before respondent and its insurance fund's witnesses testified in this claim that the written job description did not correctly describe the job or that respondent would have accommodated his injuries and would have provided him with appropriate training.

The Board concludes claimant did not unreasonably refuse to accept or attempt to perform the communications officer job. Had respondent or its insurance fund corrected claimant's misconceptions or in some other manner communicated respondent's intentions to accommodate claimant's injuries, the outcome of this claim would have been radically different.

Based upon the above, the Board rejects respondent and its insurance fund's argument that a post-injury wage should be imputed to claimant based upon the salary of the communications officer position. Nonetheless, a post-injury wage must be imputed as claimant has failed to make a good faith effort to find other employment.

The Board rejects claimant's argument that his disability benefits constitute a post-injury wage. The Board is not aware of any authority, statutory or case law, that supports such a position. Furthermore, the Board was unable to find any evidence in the record regarding claimant's post-injury ability to earn wages. Accordingly, the Board will impute a post-injury wage based on the federal minimum wage of \$5.15 per hour, or \$206 per week, which creates a 76 percent wage loss when compared to claimant's pre-injury average weekly wage of \$854.53.<sup>3</sup>

### 3. What is claimant's permanent partial general disability?

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of**

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<sup>3</sup> At page 27 of claimant's brief to the Board, claimant states that his pre-injury average weekly wage was \$852. But respondent and its insurance fund acknowledged at page two of their brief to the Board that claimant's pre-injury average weekly wage was \$854.53.

**permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.**<sup>4</sup> (Emphasis added.)

But that statute must be read in light of *Foulk*<sup>5</sup> and *Copeland*.<sup>6</sup> In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual post-injury wages being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

If a finding is made that a good faith effort has not been made, the factfinder [*sic*] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .<sup>7</sup>

The Kansas Court of Appeals in *Watson*<sup>8</sup> more recently reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

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<sup>4</sup> K.S.A. 44-510e.

<sup>5</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>6</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>7</sup> *Id.* at 320.

<sup>8</sup> *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.<sup>9</sup>

As indicated in the preceding section, the Board is imputing a post-injury wage of \$206 per week as claimant has failed to prove he made a good faith effort to find appropriate employment after it was determined he could no longer work as a firefighter and EMT. Consequently, for purposes of the wage loss prong of the permanent partial general disability formula claimant has a 76 percent wage loss.

Considering the testimonies of Dr. Brown, who reviewed the list of former work tasks prepared by vocational consultant Michael J. Dreiling; Dr. Koprivica, who also considered Mr. Dreiling's task list; and Dr. Hendler, who reviewed both Mr. Dreiling's list and a list prepared by employment consultant Dick Santner, the Board concludes claimant has a task loss that lies somewhere between 31 and 77 percent. Consequently, the Board averages those percentages and concludes claimant has lost the ability to perform approximately 54 percent of the work tasks that he performed in the 15-year period before he sustained these work-related injuries.

As required by the permanent partial general disability formula, the 76 percent wage loss percentage is averaged with the 54 percent task loss percentage, which creates a 65 percent permanent partial general disability due to the bilateral carpal tunnel syndrome, neck and low back injuries.

The Board adopts the Judge's findings and conclusions to the extent they are not inconsistent with the above.

### **AWARD**

**WHEREFORE**, the Board modifies the June 25, 2003 Award and increases claimant's permanent partial general disability from 29.82 percent to 65 percent. The Board also grants claimant workers compensation benefits for his bilateral carpal tunnel syndrome.

Randall D. Brumback is granted compensation from the City of Leawood and its insurance fund for an approximate May 1, 2001 accident and resulting disability. Based upon an average weekly wage of \$854.53, Mr. Brumback is entitled to receive eight weeks of temporary total disability benefits at \$401 per week, or \$3,208, plus 241.38 weeks of

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<sup>9</sup> *Id.* at Syl. ¶ 4.

permanent partial general disability benefits at \$401 per week, or \$96,792, for a 65 percent permanent partial general disability and a total award not to exceed \$100,000.

As of January 12, 2004, Mr. Brumback is entitled to receive eight weeks of temporary total disability compensation at \$401 per week in the sum of \$3,208, plus 132.86 weeks of permanent partial general disability compensation at \$401 per week in the sum of \$53,276.86, for a total due and owing of \$56,484.86, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$43,515.14 shall be paid at \$401 per week until paid or until further order of the Director.

Future medical benefits may be considered upon proper application to the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael R. Lawless, Attorney for Claimant  
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Fund  
Robert H. Foerschler, Administrative Law Judge  
Anne Haight, Acting Workers Compensation Director